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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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# No. 960

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J. C. PATTERSON, ET AL.,
*Petitioners,*

*vs.*

THE TEXAS COMPANY.

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**PETITIONERS' MOTION FOR REHEARING ON THEIR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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J. I. KILPATRICK,
*Counsel for Petitioners.*
JACK M. RANDAL,
*One of the Petitioners.*

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Petitioners respectfully request the Court to set aside its order entered on June 1, 1943, denying the Petition for Writ of Certiorari filed herein by J. C. Patterson, et al., and that it reconsider the Petition for Writ of Certiorari heretofore filed.

## I.

### Summary Statement.

This statement is made in the light of the statement made in the Petition for Writ of Certiorari and in addition thereto.

The Petitioners executed a mineral deed to the Mineral Investing Corporation (R. 37), covering two and one-half

sections of land in Yoakum County, Texas. The conveyance contains this provision:

> "It is agreed that the Mineral Investing Corporation, its successors or assigns, shall never be under obligation to lease said land for oil, gas or mineral purposes but should the Mineral Investing Corporation, its successors or assigns, lease said land for oil, gas or mineral purposes, then one-fourth (¼) of the bonus paid for said lease and one-fourth (¼) of the rentals paid under said lease shall be paid to the Grantors herein, their heirs or assigns, as a part of the consideration for this conveyance. It being understood that the amount of the bonus, rentals and royalties for which the Mineral Investing Corporation may execute a lease shall be at its sole discretion."

The Texas Company purchased the property from the Mineral Investing Corporation (R. 366). The Texas Company then leased the two and one-half sections in three several leases indirectly, through its employee, to itself (R. 370-372) for the usual one-eighth (⅛) royalty and without any bonus (R. 126 and 116. R. 54-56). The leases were dated December 30, 1938 (R. 372). The Texas Company then, by an AGREEMENT with the Aloco Oil Company (R. 109) dated December 31, 1938, which AGREEMENT was sent up to this Court as an original exhibit marked as Plaintiffs' Exhibit No. 7, assigned 15,846 acres in leases, including the three leases on the Petitioners' lands, to the Aloco Oil Company (R. 109. Pl. Ex. No. 7). The AGREEMENT was equivalent to a lease of the Patterson lands for the bonus claimed by the Petitioners, that is, their pro-rata part of the consideration for the AGREEMENT. The matter was handled in this way for the convenience of The Texas Company (R. 171). The AGREEMENT recites a consideration of $441,445.72 in cash (R. 109. Pl. Ex. No. 7). Section 8 of the AGREEMENT (R. 109. P. 38, Pl. Ex. No. 7) provides for a one-

eighth (⅛) overriding royalty. The AGREEMENT then provides, on page 29, that The Texas Company has the privilege of receiving a portion of the net profits and $3500.00 for each producing well on the 15,846 acres of land. The AGREEMENT, at page 31, provides for an additional one-eighth (⅛) overriding royalty under the conditions therein stated. The Texas Company did not try to lease the Patterson lands to anyone else (R. 136 and 175). The Petitioners, having a one-fourth bonus interest in the 1600 acres, claim 400/15,846 of the entire consideration for the AGREEMENT (R. 109). The consideration in the AGREEMENT was for the entire acreage, and, consequently, was spread over the entire acreage.

In a case where a purchaser acquires more than one tract of land by deed, and there is a vendor's lien upon one of the tracts of land, which he assumes, he thereby spreads a blanket lien over both tracts to secure the indebtedness. *Texas Land & Loan Company* v. *Watkins,* 34 S. W. 996 (Tex. Civ. App.); *Lanham* v. *West,* 209 S. W. 258 (Tex. Civ. App.) This principle is applicable here.

## II.

### Question Presented.

The question presented in the Petition for Writ of Certiorari is: "Is the consideration for the AGREEMENT (R. 109. Pl. Ex. No. 7), the usual one-eighth (⅛) royalty having been reserved in the lease to The Texas Company, bonus under the mineral deed described above?"

## III.

### Previous Opinion.

The opinion of the United States Circuit Court of Appeals is reported in 131 Fed. (2d) 998.

## IV.

### Reasons Justifying the Writ of Certiorari.

The Petitioners contend that under the law they are entitled to receive 400/15,846 of the consideration for the AGREEMENT (R. 109. Pl. Ex. No. 7) as bonus. The Texas Company has refused to pay them anything, and the Court of Civil Appeals confirmed that position.

In the case of *State National Bank of Corpus Christi* v. *Morgan,* 135 Tex. 509, 143 S. W. (2d) 757, by the Commission of Appeals of Texas, the Bank had conveyed to one Fisher a tract of land but reserved "an undivided one-half (½) interest in and to all of the royalty and oil and gas, casing-head gas, gasoline, and in all other minerals in and under and that may be produced and mined" from the land conveyed. Then Fisher conveyed the land to Morgan. Morgan executed three several leases on the property, and in the leases he retained: (1) one-eighth (⅛ of the oil produced and saved from the land; and (2) in the 5th paragraph of the lease he provided "In addition to all other reservations of royalties herein made and provided for the benefit of lessors, there is reserved to lessors, their heirs and assigns, the title to an undivided one-eighth of seven-eighths (⅛ of ⅞) equal part of all oil, gas, and other minerals" * * * "until the lessor shall have received the sum $48,000.00, whereupon this reservation shall terminate."

The Bank contended that it was entitled to receive a pro rata part of the reservations set out in paragraph 5 of the lease as royalties. The Court held:

> "The fact stated in the foregoing quotation, that the usual royalty in oil and gas leases is ⅛, is in our opinion one so generally known that judicial knowledge may be taken of it. Cheek *v.* Metzer, 116 Tex. 356, 291 S. W. 860, 862; Leonard *v.* Prater, Com. App., 36 S. W. (2d) 216, 220, 86 A. L. R. 499. When that fact

is accepted, the oil payments reserved in the fifth paragraph of the leases executed by Morgan are bonuses as defined in the above quotation; they are sums contracted to be paid as consideration for the leases over and above the usual royalties."

The Court also held:

"Application for writ of error was refused in Sheppard *v.* Stanolind Oil & Gas Company, Tex. Civ. App. 125 S. W. (2d) 643, 647, and thereby the determination of the principles of law declared in the opinion in that case was approved."

That part of the opinion in the above cause depended upon by the Respondent to sustain its position is dicta and is unnecessary to the decision in said cause.

Under the deed to the Mineral Investing Corporation, which interest was acquired by The Texas Company, the Petitioners are beneficiaries under a trust created by the original mineral deed:

"'A fiduciary relationship is not limited to cases of trustee and *cestui que trust*, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting superiority and domination on the other. The origin of the confidence may be moral, social, domestic, or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation.'" Grand Trunk Western R. Co. *v.* Chicago & Western Indiana R. Co., 131 F. (2d) 215.

In the case of *Surgi* v. *First National Bank and Trust Company*, 125 F. (2d) 425, by the Fifth Circuit, the court held:

"* * * where the trustee wrongfully mingles the trust property with his individual property in one indistin-

guishable mass, the beneficiary is entitled, at his option, to enforce a constructive trust on the commingled property. It finds its most usual application in connection with monies and funds which in their nature have no distinguishing marks. For the same reason it applies to other kinds of property only when they cannot be distinguished from a general mass into which trust property has gone."

The Texas Company admitted in its pleadings (R. 59) that the Petitioners were entitled to a pro-rata part of the consideration recited in the AGREEMENT when it stated that the Petitioners were entitled to a part of the $3500.00 per well for producing wells on the Patterson lands. This admission also appears on page 14 of the Brief of the Respondent in opposition to the Petition for Writ of Certiorari. The Texas Company therefore admits that at least a part of the consideration for the AGREEMENT (R. 109. Pl. Ex. No. 7) is *bonus*. It appears to the Petitioners that that admission on the prt of The Texas Company, trying to make a concession in behalf of the Petitioners, reveals that the entire consideration for the AGREEMENT is *bonus* as contended for by the Petitioners. The Petitioners do not think that The Texas Company can pro-rate the consideration for the AGREEMENT as it sees fit, calling a part of the consideration *bonus* and a part of it strictly *royalty*. The Circuit Court of Appeals did not hold that Petitioners were entitled to receive any part of the $3500.00 per producing well, and thereby denied the Petitioners the benefit of the admission in the Respondent's Brief and pleadings. The Texas Company assigned, as set out in the AGREEMENT (R. 109. Pl. Ex. No. 7) 15,846 acres, which included the 1600 acres in which the Petitioners have a 400-acre bonus interest, and by that process the Petitioners acquired an interest in the whole consideration for the AGREEMENT.

In the case of *Austin Bros.* v. *Patton*, 294 S. W. 537 (Tex. Com. App.), the Court said:

> "It is elementary in the law of evidence that, where parties have expressed their agreement in writing and the terms thereof are unambiguous, the same is conclusive and will supersede all prior agreements or stipulations unless the instrument is set aside for some equitable reason. The contract of a county is no exception to this universal rule, and neither is this character of case an exception merely because the violation of the rule of evidence would disclose a contract void as against law or public policy. It is a wholesome rule that the written contract presumptively is conclusive, until the integrity of such contract has been challenged upon some recognized equitable ground."

The Texas Company did not attack the consideration for the AGREEMENT in any manner, either in its pleadings or in its evidence. The Texas Company did not have the sole discretion of disposing of the property for any consideration which it saw fit to dispose of it.

In the case of *Cowden* v. *Broderick and Calvert*, 114 S. W. (2d) 1171 (Tex. Sup.), the Court said:

> " 'At the discretion of' may, under some circumstances, mean 'at the option of,' but usually it does not. Discretion differs from uncontrolled will. It is thus defined in *The Styria v. Morgan*, 186 U. S. 1, 22 S. Ct. 731, 734, 46 L. Ed. 1027, 1033: 'Discretion means the equitable decision of what is just and proper under the circumstances.' "

**Prayer.**

The Petitioners therefore respectfully pray that the order of this Court heretofore entered denying the Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit be set aside, and that the Writ of Certiorari now be granted as prayed for in the Petition.

The undersigned counsel and Petitioners hereby certify that this Motion for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

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